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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

CLAYTON J. CHARBONNET, JR., AND
CLAYTON J. CHARBONNET, JR., D.D.S.,
A PROFESSIONAL CORPORATION,

Petitioners,

versus

SHERIFF HARRY LEE, THE JEFFERSON PARISH SHERIFF'S OFFICE, DONALD E. STRAIN, D.D.S., A PROFESSIONAL DENTAL CORPORATION, JAMES D. KISER, D.D.S., A PROFESSIONAL DENTAL CORPORATION, JOSEPH J. COLLURA, JR., D.D.S., A PROFESSIONAL DENTAL CORPORATION, DONALD E. STRAIN, JAMES D. KISER, JOSEPH J. COLLURA, JR., AND LAKESIDE DENTAL GROUP,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rules of Civil Procedure 12(b), 12(h)(2), and 50(b) prevent the granting of a motion for JNOV for failure to state a claim upon which relief can be granted when the basis for the motion was not raised in the motion for directed verdict, or as a defense in the answer, or in the pre-trial order.

2. Whether, as a matter of law, there can be no violation of 42 U.S.C. §1983 and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution when a state actor violates an established, constitutional procedure which gives him broad discretionary power and authority to effect a deprivation, and which procedure he believed he was obeying, simply because an adequate post-deprivation remedy exists under state law.

PARTIES TO THE PROCEEDING

Clayton J. Charbonnet, Jr., Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation, Sheriff Harry Lee, The Jefferson Parish Sheriff's Office, Donald E. Strain, D.D.S., A Professional Dental Corporation, James D. Kiser, D.D.S., A Professional Dental Corporation, Joseph J. Collura, D.D.S., A Professional Dental Corporation, Donald E. Strain, James D. Kiser, Joseph J. Collura, Jr., Lakeside Dental Group, and Lt. Edwin McClendon.

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To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioners, Clayton J. Charbonnet, Jr., and Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation,

(hereinafter sometimes "Dr. Charbonnet"), respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on January 28, 1992.

OPINIONS AND JUDGMENTS BELOW

The Judgment of the United States District Court for the Eastern District of Louisiana, filed December 11, 1989, is reprinted in the Appendix to this Petition at pages App. 1 through App. 2. The Memorandum and Order of the United States District Court for the Eastern District of Louisiana, filed January 25, 1990, is reprinted in the Appendix to this Petition at pages App. 3 through App. 11. The Judgment of the United States District Court for the Eastern District of Louisiana, filed January 31, 1990, is reprinted in the Appendix to this Petition at pages App. 12 through App. 13. The Opinion of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on January 28, 1992, reported at 951 F.2d 638 (5th Cir. 1992), is reprinted in the Appendix at pages App. 14 through App. 29.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari was filed within ninety days of January 28, 1992, the date of entry of the Court of Appeals' Opinion.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States and federal statutory provisions and Federal Rules of Civil Procedure:

The Fourth Amendment to the Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rules of Civil Procedure 12(b)

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following

defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rules of Civil Procedure 12(h) (2)

A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

Federal Rules of Civil Procedure 16(e)

Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Federal Rules of Civil Procedure 50(b)

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT OF THE CASE

I. How The Federal Questions Were Presented

The federal questions involved in this case were first presented in Petitioner's Complaint, filed on October 25, 1988, in the United States District Court for the Eastern District of Louisiana. Dr. Charbonnet subsequently filed an Amended Complaint and a Second Supplemental and Amended Complaint. The Complaint stated, *inter alia*, that the district court had jurisdiction over the matter pursuant to 28 U.S.C. §1331 and §1343 for damages resulting from the defendants' violations of 42 U.S.C. §1983. Dr. Charbonnet pleaded that his former partners (the "Dentists") and a deputy from the Jefferson Parish Sheriff's Office ("JPSO"), later identified as Lt. Edwin McClendon, all acting under color of state law, entered his private office, searched it, and seized and removed furniture, equipment, records, and personal items without proper writs or orders obtained by required procedural due process. Dr. Charbonnet alleged that Lt. McClendon was acting in the course and scope of his employment and/or with the authority or the apparent authority of the JPSO.

Dr. Charbonnet pleaded that the Dentists and Lt. McClendon conspired to deny him equal protection and due process of law in violation of 42 U.S.C. §1983. He also alleged that he was deprived of the use and value of his property and suffered personal damages and damages to his professional practice and reputation. He sought punitive damages plus attorney's fees and all costs of the litigation, all as authorized by 42 U.S.C. §1988. Dr. Charbonnet pleaded that the activities of the JPSO and Lt.

McClendon violated the Fourth Amendment of the U.S. Constitution and constituted a deprivation of due process of law. He also alleged, alternatively, that if there were no conspiracy between the JPSO, the Dentists, and/or Lt. McClendon, Lt. McClendon's acts were nonetheless taken under color of state law sufficient to impose liability on him and the JPSO.

II. Statement of Facts

Dr. Clayton Charbonnet is an orthodontist who owns and occupies a professional office located at 5036 Yale Street, Metairie, Louisiana. In July, 1987, Dr. Charbonnet joined the Lakeside Dental Group partnership ("LDG"), consisting of Drs. James D. Kiser, Joseph J. Collura, Jr., and Donald E. Strain (the "Dentists"). When Dr. Charbonnet became a partner in LDG, he transferred some but not all of his professional property to the partnership, although he remained in his own office where his property and professional equipment were installed. On August 30, 1988, Dr. Charbonnet resigned from the partnership.

On August 31, 1988 the Dentists contacted the Jefferson Parish Sheriff's Office ("JPSO") stating they had papers allowing them to take property from Dr. Charbonnet's office. Lt. Edwin McClendon, who was in charge of the appropriate civil department, was contacted and advised to contact Dr. Collura. Lt. McClendon had spent all but six months since 1980 in the JPSO's civil division and had been involved in hundreds of civil seizures.

At approximately 8:00 p.m. on August 31, 1988, Lt. McClendon appeared at Dr. Charbonnet's office, where

he met some of the Dentists and a moving crew in the parking lot below the building. Although the Dentists had no orders permitting Lt. McClendon to participate in a seizure, he did not depart at that time. Instead, Lt. McClendon, who was on active duty and had his sheriff's badge plainly visible, accompanied the Dentists into Dr. Charbonnet's office. Dr. Charbonnet requested that the Dentists and Lt. McClendon leave since they had no court order to seize his property, but the Dentists and Lt. McClendon refused to leave. Dr. Charbonnet then called his attorney and again asked Lt. McClendon to leave; but he remained. Thereafter, Dr. Charbonnet called the emergency 911 number to obtain help from criminal deputies. Lt. McClendon met with two deputies who arrived pursuant to Dr. Charbonnet's 911 call. After meeting with Lt. McClendon, the deputies departed without taking further action.

By the time the evening was over, Dr. Charbonnet's office had been all but stripped bare. While Lt. McClendon personally took nothing, moving personnel who accompanied the Dentists slashed carpets to remove chairs bolted to the floor, removed light fixtures from the ceiling, took dental equipment, and left the office in a total shambles.

In an effort to continue his practice, Dr. Charbonnet had to replace essential equipment. He suffered emotional trauma and continued to suffer distress on an ongoing basis because of these events and his inability to reestablish the same quality professional environment.

III. Proceedings Below

On October 25, 1988, Clayton J. Charbonnet, Jr., and Clayton J. Charbonnet, Jr., D.D.S., A Professional Dental Corporation, filed suit in the United States District Court for the Eastern District of Louisiana against the defendants named in the caption herein. Lt. Edwin McClendon, the Respondent here, was later added as a defendant.

Dr. Charbonnet's complaint was specifically predicated upon 42 U.S.C. §1983 and alleged in part that his civil rights were violated by Sheriff Harry Lee and Lt. McClendon of the JPSO. Dr. Charbonnet also brought pendent state law claims against the Dentists and their liability insurer. Prior to trial, the trial court granted summary judgment, dismissing the Dentists' insurer from the litigation. Also prior to trial, the claims against the Dentists were resolved, and they were dismissed from the litigation. Therefore, the only claims tried were the §1983 claims against Sheriff Harry Lee and Lt. Edwin McClendon.

The case was tried on December 4 and 5, 1989. After Dr. Charbonnet rested, both defendants moved for a directed verdict. Sheriff Lee argued that he had specifically promulgated a constitutional policy to control and govern the involvement of Sheriff's Office employees in connection with civil matters. Lt. McClendon argued that, in keeping with the JPSO policy, he had remained neutral and was entitled to qualified immunity even if he violated the policy.

The trial court dismissed Sheriff Harry Lee, finding the JPSO policy constitutional. However, the court denied Lt. McClendon's motion for directed verdict, finding that,

while the policy was constitutional, Lt. McClendon had potential exposure for misapplying that policy. The court was clearly of the mind that it was for the jury to decide Lt. McClendon's liability for violating Dr. Charbonnet's constitutional rights as a result of his misapplying the JPSO policy requiring noninvolvement and nonintervention in certain civil matters.

At the conclusion of all of the evidence, the court conducted an exhaustive conference during which the substance of proposed jury charges was analyzed and debated. During the entire charge conference, neither the court nor Lt. McClendon ever questioned whether Dr. Charbonnet's §1983 claim was properly before the court. No one attributed any significance to the availability of a postdeprivation state court procedure. The entire thrust of Lt. McClendon's defense, just as articulated in the pre-trial order[1] and claimed by his counsel during directed verdict argument, was the availability of qualified immunity.

The jury found Lt. McClendon liable for violating Dr. Charbonnet's constitutional rights under 42 U.S.C. §1983 and awarded him compensatory and punitive damages.

Lt. McClendon subsequently filed a motion for a Rule 50 Judgment notwithstanding the verdict ("JNOV") and, alternatively, for a new trial. In post trial motions, Lt. McClendon, apparently recognizing that his qualified

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[1] Rule 16(e) of the Federal Rules of Civil Procedure advises that the pre-trial order controls the course of proceedings. In the pre-trial order, Lt. McClendon stated as a contested issue of law "Whether or not Edwin McClendon is entitled to qualified immunity."

immunity defense had been rejected, abandoned it and presented a *completely new claim*. Rather than contend that his actions were protected by qualified immunity, Lt. McClendon pursued the new position that Dr. Charbonnet failed to state a claim for relief under 42 U.S.C. §1983 because he had an adequate state court postdeprivation remedy. Thereafter, focusing on *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), a case which had not previously been considered germane, the trial court not only substituted its judgment for the jury's but, expanding beyond the scope of Lt. McClendon's post trial motions, apparently concluded that because Dr. Charbonnet prevailed on the merits, Lt. McClendon's actions must have been "random and unauthorized" so that a JNOV was warranted.

The trial court further found that even if a JNOV was not appropriate, a new trial was necessary as to both liability and damages because the compensatory damage award was "both excessive and against the great weight of the evidence" and because the punitive damage awarded was "clearly inappropriate because it was so excessive as to shock the conscience" and was "not supported by any evidence." Finally, the district court, acknowledging the possibility that its JNOV and new trial orders might be erroneous, concluded, "At the very least, the defendant is entitled to a new trial on the punitive damages issue." (App. 10-11).

Dr. Charbonnet appealed these rulings to the United States Court of Appeals for the Fifth Circuit. In a January 28, 1992 decision, that court affirmed the trial court, finding specifically that the matter was "entirely controlled" by its recent *en banc* opinion in *Caine v. Hardy*,

943 F.2d 1406 (5th Cir. 1991) (*en banc*), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1474, ___ L.Ed.2d ___ (1992), and *Caine's* narrow reading of *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The Fifth Circuit found that Lt. McClendon's motion for JNOV was appropriately granted because a postdeprivation remedy was available to Dr. Charbonnet under state law; because Lt. McClendon's actions were "unauthorized" and "unforeseeable" as defined by *Caine v. Hardy*; and because it was "impossible" for better predeprivation safeguards to have been provided. In sum, the court found that Dr. Charbonnet's claim failed to state a claim, even though it had been successfully tried to a jury. In so doing, the court misapplied the intent and language of this Court's decision in *Zinermon v. Burch*, which should control this case. Finally, the Court of Appeal stated that because it affirmed the JNOV it did not need to decide the propriety of the trial court's alternative ruling granting a new trial based on the alleged excessiveness of the damages awarded.

REASONS FOR GRANTING THE WRIT

Dr. Charbonnet's Petition for Writ of Certiorari should be granted because the defendant's motion for JNOV was improperly granted.

Dr. Charbonnet's Writ should also be granted because the Fifth Circuit erroneously and improperly determined that "this case is entirely controlled by *Caine v. Hardy* and its narrow reading of *Zinermon.*" *Charbonnet v. Lee*, 951 F.2d 638, 645 (5th Cir. 1992). (App. 29). The jury's verdict must be reinstated or the Fifth Circuit will

have so restricted *Zinermon* that it will have no future application and be a one case rule of law. *Zinermon* was intended to maintain, not restrict, the rights of petitioners under 42 U.S.C. §1983. Dr. Charbonnet's circumstances are analogous to those in *Zinermon*. Even under *Caine* and the Fifth Circuit's view that *Zinermon* created only a narrow exception to the *Parratt/Hudson* doctrine [*Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)], Dr. Charbonnet stated and proved a cognizable claim.

The present case is also deserving of review because of its strong procedural posture. Dr. Charbonnet's case was tried to a jury for two days, and he obtained a verdict awarding him compensatory and punitive damages. Dr. Charbonnet respectfully suggests that this is thus a case of first impression regarding the interrelationship of 42 U.S.C. §1983, the *Parratt/Hudson* doctrine, and this Court's recent pronouncement on this subject in *Zinermon*. Unlike *Parratt*, *Zinermon*, or *Caine v. Hardy*, this case comes to this Court *after* a merits trial. For this reason alone, Dr. Charbonnet's Petition for a Writ of Certiorari should be granted.

Finally, Dr. Charbonnet respectfully suggests that if *Caine v. Hardy* is allowed to narrow *Zinermon* so as to preclude Dr. Charbonnet's claim and other claims like it, the relief intended by Congress to be available under 42 U.S.C. §1983 will be all but foreclosed to claims based on procedural due process. Dr. Charbonnet stated an acknowledged claim and won before the jury, but because he won, he lost! *Caine*, as applied in this case, allows the

untenable result that if a plaintiff proves that the defendant violated a constitutional policy, even when the defense is based on the very ground that he acted within that policy, the defendant's actions must then have been "random and unauthorized." If the acts are "random and unauthorized," then as long as a postdeprivation state forum exists, the plaintiff fails to state a claim for relief under 42 U.S.C. §1983.

As the Fifth Circuit acknowledged:

> Dr. Charbonnet's letter brief correctly describes the "inescapable corner" into which constitutional law has now painted such a plaintiff. If the policy he challenges is constitutional, there is no official liability; a defendant in his official capacity is merely a representative of that policy. If a state actor is found to have reasonably obeyed an established procedure in his individual capacity, then he wins on the merits. If the official is found to have violated that procedure (and there is an adequate remedy under state law), then he is usually protected in his individual capacity by the *Parratt/Hudson* doctrine. The plaintiff who seeks damages from a state actor under §1983 for violations of procedural due process can lose the war of liability by winning the battle of proof. We acknowledge that *Caine v. Hardy* does much to swing shut the door of the federal courts to suits for individual violations of procedural due process. . . .
>
> *Charbonnet*, 951 F.2d at 644-645. (App. 28-29).

ARGUMENT

I. Procedural Error

When Dr. Charbonnet instituted this lawsuit, there was no question that his claim under 42 U.S.C. §1983 was properly articulated. Throughout the case, Lt. McClendon contended that he acted as a reasonable police officer and, even if he violated the law or policy by participating in the seizure, he was entitled to qualified immunity. That defense, available to a §1983 claim, was vigorously pursued. The court took care to insure that the jury was properly charged on the parameters of that defense. However, the jury rejected that defense and awarded compensatory and punitive damages to Dr. Charbonnet.

Only after this defeat did Lt. McClendon for the first time come before the court to suggest that, because Dr. Charbonnet had a state law postdeprivation remedy, he was not entitled to have brought his claim under §1983. This post-judgment change is procedurally improper. The relief sought could not be granted on Lt. McClendon's motion for JNOV because he failed to raise it as a defense or in his directed verdict motion. See FRCP 50(b).[2] Lt. McClendon also failed to file a FRCP 12(b)(6) motion to dismiss, and that motion was waived since not raised

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[2] As stated in *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846, n. 17 (5th Cir. 1975), *rehearing denied*, 520 F.2d 943 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976), "It would be a constitutionally impermissible re-examination of the jury's verdict for the district court to enter judgment n.o.v. on a ground not raised in the motion for directed verdict." See also 9 C. Wright & A. Miller, Federal Practice and Procedure §2357, at 598 (West 1971; Supp. 1991).

before or "at the trial on the merits." FRCP 12(h)(2).[3] It was also waived because it was not an issue set forth in the pre-trial order or elsewhere. See *Merchants Nat'l Bank v. Southeastern Fire Ins. Co.*, 854 F.2d 100, 103 (5th Cir. 1988). Finally, even if it was timely raised, the court wrongly decided the new issue.

The questions of "random and unauthorized" behavior and of postdeprivation state remedies were not put at issue before or during trial. When Lt. McClendon moved for a directed verdict he did so *only* on the evidence of his "neutrality" and qualified immunity. For the courts below to conclude that Lt. McClendon's actions must have been "random and unauthorized" and hence not subject to a §1983 claim, they must have ignored all that Lt. McClendon himself claimed; i.e., that his acts were objectively in good faith and within the spirit of the policy known to and enforced by him.

The Fifth Circuit's rationale in maintaining the JNOV against Dr. Charbonnet's procedural arguments is not convincing. *Charbonnet*, 951 F.2d 638, 642-643. (App.

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[3] See also, 5A C. Wright & A. Miller, Federal Practice and Procedure §1392, at 763 (West 1990): "According to the plain language of Rule 12(h)(2), the three enumerated defenses are waived if they are not presented before the close of trial. Thus, for example, they may not be asserted for the first time on appeal. Nor can these defenses be presented through any type of post-trial motion." *See, Brown v. Trustees of Boston University*, 891 F.2d 337, 357 (1st Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990); *Brooks v. Monroe Systems for Business, Inc.*, 873 F.2d 202, 205 (8th Cir. 1989), *cert. denied*, 493 U.S. 853, 110 S.Ct. 154, 107 L.Ed.2d 112 (1989); and *Sulmeyer v. Coca Cola Co., supra* n. 2, 515 F.2d at 846.

23-25). Lt. McClendon's argument at the directed verdict stage is entirely different than that made at the JNOV stage. Such a post-trial reversal of positions at the time of the JNOV is tantamount to an untimely trap and should not be approved. See *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021, 1025 (5th Cir. 1987); *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1025 (5th Cir. 1979). Lt. McClendon's attempted post-trial defense violates FRCP 50(b) and requires a constitutionally impermissible re-examination of the jury's verdict. Dr. Charbonnet should not suffer defeat based on a defense not raised before trial and not raised at all until after the jury rendered its verdict.

II. Legal Errors

This case raises the question whether claims for violations of procedural due process brought under 42 U.S.C. §1983 have been all but eliminated by judicial decree. The question and its resolution are controlled by three cases: *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 420, *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100, and *Caine v. Hardy*, 943 F.2d 1046. As originally decided, *Parratt* was to create a limited restriction on such claims. As *Parratt's* application broadened, this Court in *Zinermon* placed *Parratt* back into its limited context by recognizing that *Parratt* had received greater application than was proper. In *Caine v. Hardy*, the Fifth Circuit determined that *Zinermon* caused only a wrinkle on the *Parratt/Hudson* doctrine rather than created a meaningful rule of law with a broad based application. In the case now before this Court, the Fifth Circuit has expanded *Parratt/Hudson* by extending *Caine v. Hardy* past

the breaking point and stripping *Zinermon* of any meaningful utility.

The trial court misapplied this Court's holding in *Parratt v. Taylor,* and the appellate court misapplied this Court's holding in *Zinermon v. Burch* when they essentially concluded that because Lt. McClendon lost at trial, his actions must have been "random and unauthorized"; and because Dr. Charbonnet had state law postdeprivation remedies, he had no claim under 42 U.S.C. §1983. The rulings misapply *Parratt* as they suggest that all violations of policy, if not shielded by "qualified immunity," automatically become "random and unauthorized" actions which, *after the fact of a merits trial,* retroactively eliminate the §1983 claim. Of course, the plaintiff will not know the vehicle of his demise until after trial; for even if he wins, he must, therefore, lose. According to the lower courts, either the state actor's conduct is within the bounds of allowable conduct under the prevailing policy or, if not, it is, as a matter of law, random and unauthorized. This view of *Parratt* improperly ignores *Zinermon* and other post-*Parratt* Supreme Court jurisprudence such as *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

Zinermon addressed whether *Parratt/Hudson* means that a complainant cannot state a cause of action for a deprivation of due process simply because a postdeprivation remedy is available in a state court. *Zinermon,* 494 U.S. at 117, 110 S.Ct. at 979, 108 L.Ed.2d at 108. The Court initially noted that the availability of state remedies is "generally irrelevant to the question of the existence of a cause of action under §1983." *Zinermon,* 494 U.S. at 124, 110 S.Ct. at 982, 108 L.Ed.2d at 113. In considering

whether a constitutional violation has occurred, one must determine "what process the State provided, and whether it was constitutionally adequate." *Zinermon*, 494 U.S. at 126, 110 S.Ct. at 983, 108 L.Ed.2d at 113. As stated in *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252, 262 (1978), the goal of procedural due process rules is "to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." While *Zinermon* acknowledges that in certain instances a postdeprivation remedy may satisfy due process demands, it notes that such circumstances are *limited* and that *Parratt* is the exception rather than the standard. *Zinermon*, 494 U.S. at 128, 110 S.Ct. at 985, 108 L.Ed.2d at 115.

In *Zinermon*, the plaintiff, Burch, claimed he was admitted and detained at a Florida State mental hospital in violation of 42 U.S.C. §1983. Burch claimed he was permitted to sign his own voluntary admission and treatment forms when he was incompetent to authorize such proceedings and that State employees, acting under color of state law, allowed him to do so without first insuring that he received proper procedural protections and was admitted by someone capable of making an informed decision. The defendants filed a 12(b)(6) motion to dismiss the complaint arguing that the allegations failed to state a claim based upon *Parratt v. Taylor*. This Court concluded that the *Zinermon* defendants misunderstood and were misapplying *Parratt*.

The *Parratt/Hudson* doctrine did not apply in *Zinermon* because the deprivation was caused by the persons who could have protected the plaintiff against a misuse of the procedures which were designed to protect him. That,

too, is the case here. Under the applicable JPSO policy, Lt. McClendon was charged with protecting the peace and maintaining the status quo.

Most important, *Zinermon* observed that while "[i]t may be permissible constitutionally for a State to have a statutory scheme like Florida's, which gives State officials broad power and little guidance in admitting mental patients . . . *when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the State officials cannot then escape liability by invoking Parratt and Hudson.*" *Zinermon*, 494 U.S. at 135, 110 S.Ct. at 988, 108 L.Ed.2d at 120 (emphasis added).[4] Because the basis of the plaintiff's suit in *Zinermon* was "to hold State officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue," *Parratt/Hudson* did not control the case. *Zinermon*, 494 U.S. at 136, 110 S.Ct. at 989, 108 L.Ed.2d at 120. That is precisely the same situation as in the present case. Here, Lt. McClendon was granted the power and authority by the State to deprive Dr. Charbonnet of his property interest. By his actions and involvement in facilitating the taking of Dr. Charbonnet's property, Lt. McClendon violated Dr. Charbonnet's right to due process. Lt. McClendon cannot escape liability by invoking *Parratt* because he was the person entrusted to

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[4] The primary premise of the Fifth Circuit's rationale in *Caine* and in the present case leads to the absurd result that there cannot be both a constitutional state policy and a violation of §1983; i.e., if the policy is constitutional, any violation thereof must be random and unauthorized so that no §1983 claim can exist. *Zinermon* shows this to be a faulty premise.

provide safeguards to prevent the deprivation of Dr. Charbonnet's property.

Zinermon identified three reasons why *Parratt/Hudson* did not apply. First, the deprivation of the plaintiff's liberty was not unpredictable. The Court distinguished that case from *Parratt* and *Hudson* because in *Parratt* and *Hudson,* the State did not know when the deprivation would occur. In *Zinermon,* the State should have known that "any erroneous deprivation [would occur] at a specific, predictable point in the admission process . . . ." *Zinermon,* 494 U.S. at 136, 110 S.Ct. at 989, 108 L.Ed.2d at 121. Second, predeprivation process was not impossible. This, again, was distinguishable from *Parratt* and *Hudson* because in those cases, "the very nature of the deprivation made predeprivation process 'impossible' ", and "the State still was not in a position to provide predeprivation process, since it could not anticipate or control such random and unauthorized intentional conduct" by the errant employee. *Zinermon,* 494 U.S. at 136, 110 S.Ct. at 989, 108 L.Ed.2d at 121.

The third reason *Parratt* and *Hudson* did not apply was that the defendant's conduct could not be characterized as "unauthorized" as that term was used in *Parratt* and *Hudson.* In *Zinermon,* the deprivation complained of arose *because* the State delegated the power and authority to the defendants, which allowed for its misuse and led to the deprivation about which plaintiff complained.

The Court held that the defendants would not be allowed to escape §1983 liability by claiming that their conduct was random and unauthorized and that, consequently, the State could not predict or avoid it, so that all

the process to which plaintiff would be due was to pursue a postdeprivation remedy. The plaintiff was deprived of his constitutional rights not only by the very officials charged by the State with the power to so deprive him but also by those charged with the duty to employ the available procedural safeguards. This type of deprivation is foreseeable and is predictable at a specific point in time. Because properly applied predeprivation safeguards which were available may have prevented the deprivation, *Parratt* and *Hudson* were not applicable and the plaintiff's complaint did state a claim under §1983.

For the same three reasons expressed in *Zinermon, Parratt* and *Hudson* are not applicable to the present case. First, Lt. McClendon cannot claim that the deprivation of Dr. Charbonnet's property was unpredictable. The JPSO was clearly aware of the fact that its officers were regularly involved in civil matters outside of the civil seizure process. The JPSO could predict when deprivations would occur as a result of an officer's actions and promulgated a policy with respect thereto. Lt. McClendon himself could specifically predict when deprivation would occur in this instance.

Second, predeprivation proceedings were available here. Louisiana had in effect a procedure for obtaining proper court authority to seize the property of another. Lt. McClendon was charged with enforcing those orders. The JPSO policy, also known to Lt. McClendon, forbade undue involvement in civil matters unless proper court authority was present. Lt. McClendon was in a position to ensure that proper proceedings were followed *before* he involved himself.

Third, Lt. McClendon cannot now properly claim that his conduct was "unauthorized" in the same sense as that term was employed in *Parratt/Hudson*. Lt. McClendon had the authority to prevent or to allow the state supported deprivation that occurred here. Had the dentists possessed the proper court authority, Lt. McClendon would have had the duty to effect the taking of Dr. Charbonnet's property. But since they did not, his charge was not to assist them in taking the property. Here, Lt. McClendon contended that he did not assist in the taking, that he was at all times acting neutrally, and that his conduct, even if wrong, entitled him to a qualified immunity. He was, nonetheless, found liable by a jury to have gone beyond neutrality.

Because the deprivation of Dr. Charbonnet's property resulted from Lt. McClendon's misapplication of official policy does not make Lt. McClendon's conduct "unauthorized" as contemplated by *Parratt* and as interpreted in *Zinermon*. Lt. McClendon always contended that in exercising his discretion he was adhering to an official policy. Thus, under *Zinermon*, Lt. McClendon cannot rightly claim that his conduct was random, unauthorized, unpredictable, or unpreventable so that Dr. Charbonnet would be entitled only to a postdeprivation state remedy.

A writ of certiorari is essential so that this Court can undo the unwarranted infringement on *Zinermon* which the lower courts' decisions cause. Should the Fifth Circuit's decision go unreviewed, *Zinermon* will have been reduced to a decision which articulates a rule of law with no applicability beyond a single set of facts. Perhaps even worse, should this decision not be reviewed, reversed,

and remanded to the Fifth Circuit for consideration of the new trial award, which it has not yet addressed, a plaintiff can plead, prove, and prevail upon a recognized cause of action only to be reversed because proof sufficient to warrant a victory compels defeat.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CLAYTON J. CHARBONNET, JR.	*	CIVIL ACTION
VERSUS	*	NO. 88-4718
SHERIFF HARRY LEE ET AL	*	SECTION "G"

JUDGMENT

(Filed Dec. 11, 1989)

The Court having granted the motions for directed verdict of defendants Jefferson Parish Sheriff's Office and Sheriff Harry Lee, and considering the jury's answers to the interrogatories propounded by the Court at the trial of this matter; and the direction of the Court as to entry of judgment;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants Jefferson Parish Sheriff's Office and Sheriff Harry Lee dismissing plaintiff's claims with prejudice;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of plaintiff, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr. D.D.S., and against defendant Lt. Edwin McClendon, in the amount of fifty thousand dollars and no cents ($50,000.00);

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of plaintiff, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr. D.D.S., and against defendant Lt. Edwin McClendon, for punitive damages in the amount of one hundred seventy-five thousand dollars and no cents ($175,000.00).

New Orleans, Louisiana, this 8th day of December, 1989.

/s/ Lorretta G. Whyte
LORRETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ Morey L. Sear
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
SEAR, J.
JANUARY 22, 1990

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CLAYTON J. CHARBONNET, JR. ET AL	*	CIVIL ACTION
	*	NO. 88-4718
VERSUS	*	SECTION "G"
SHERIFF HARRY LEE ET AL	*	

MEMORANDUM AND ORDER

(Filed Jan. 25, 1990)

The facts of this dispute are more fully developed in my Minute Entry dated November 17, 1989. Briefly, Lt. McClendon entered plaintiff's dental office with plaintiff's former partners ostensibly to preserve the peace while the former partners removed furniture and equipment from plaintiff's office. A jury trial was held in this matter on December 4-5, 1989. The jury found that Lt. McClendon violated plaintiff's constitutional rights when he did not remain neutral to preserve the peace, and that he was not entitled to a good faith immunity. The jury awarded the plaintiff $50,000.00 in compensatory damages and $175,000.00 in punitive damages.

Defendant Lt. McClendon filed a motion for judgment notwithstanding the verdict and a judgment for a new trial. In support of his J n.o.v. motion, defendant argues that plaintiff does not have a § 1983 action because state law provides adequate post-deprivation remedies. Defendant then argues for a new trial because the jury

awarded excessive damages and the jury charges were misleading. Plaintiff opposes the motions and argues that the cases cited by defendant in support of a J n.o.v. are inapplicable. Plaintiff further argues that the jury's award is neither excessive nor were the jury charges misleading.

Defendant argues that a § 1983 cause of action is simply not available to this plaintiff because state law provides him with an adequate post-deprivation remedy, *i.e.*, filing a tort suit for damages. In support of this argument, defendant cites three cases, *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Thibodeaux v. Bordelon*, 740 F.2d 329 (5th Cir. 1984).

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.' "[1] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Generally, the individual should be given "an opportunity for a hearing *before* he is deprived of any significant property interest." *Id.* There are, however, some situations in which a post-deprivation hearing will satisfy due process requirements. *Id.* at 542 n.7 (citations omitted).

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[1] In *Thibodeaux v. Bordelon*, 740 F.2d 329, 336 (5th Cir. 1984), the Fifth Circuit stated: "A predeprivation hearing is not feasible with respect to a deprivation . . . that is 'random and unauthorized.' " *Thibodeaux* involved a prison inmate's suit under § 1983 after a nearby cell-mate started a fire and seriously injured plaintiff.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court held that a prisoner did not have a § 1983 claim for deprivation of his property without due process because the state provided an adequate post-deprivation remedy. Parratt sued the prison officials in charge of mail distribution after they failed to follow normal procedures, which resulted in the loss of Parratt's mail ordered hobby materials. The Court noted,

> [E]ither the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process.

Parratt, 451 U.S. at 539 (footnote omitted). The Court based its decision on prior cases in which important governmental concerns – health and safety – authorized the seizures of property without a predeprivation hearing. *See, e.g., North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (unwholesome food); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (drugs).

The *Parratt* inquiry into the adequacy of a state post-deprivation remedies is only undertaken when a predeprivation hearing is impractical or not feasible.[2] Recently,

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[2] *See Cleveland v. Loudermill*, 470 U.S. 532, 542 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (citations omitted); *Augustine v. Doe*, 740 F.2d 322, 329 (5th Cir. 1984) ("*Parratt* applies only when the nature of the challenged conduct is such that the provision of predeprivation procedural

(Continued on following page)

the Supreme Court stated, "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Federal Deposit Insurance Corp. v. Mallen*, 108 S. Ct. 1780, 1787 (1988) (prompt suspension of indicted bank officer). As the Fifth Circuit recognized in *Thibodeaux v. Bordelon*, 740 F.2d 329, 336 (5th Cir. 1984), a predeprivation hearing is always impractical or not feasible for random and unauthorized acts.

The *Parratt* Court further stated,

> "The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the State. Indeed, in most

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safeguards is impracticable or infeasible."); *see also* S. Nahmod, *Civil Rights and Civil Liberties Litigation* § 310, at 148 n.148 (2d ed. 1986).

> cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation. . . . "

Parratt, 451 U.S. at 541. Under a literal application of this "random and unauthorized" language, the plaintiff in this case has failed to allege a claim cognizable under § 1983.

The Fifth Circuit applied *Parratt* to a somewhat similar situation in *Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984). The *Augustine* plaintiff filed a § 1983 claim against the State of Louisiana, the Lafayette Parish Police Jury, the Lafayette Sheriff, and two unnamed deputy sheriffs for deprivation of his constitutional rights. The police officers entered plaintiff's home without a warrant or plaintiff's consent after a resident of Lafayette reported that plaintiff had stolen his pet. Upon entry into plaintiff's house, the officers demanded that plaintiff accompany them to the police station and bring the dog with him.

The *Augustine* plaintiff later sued for violations of his fourth amendment right to freedom from unlawful search and seizure and his fourteenth amendment right to procedural due process before a deprivation of property. The trial court granted defendant's motion to dismiss the sheriff and the two officers for failure to state a claim upon which relief can be granted. The Fifth Circuit reversed the trial court's decision and held *Parratt* inapplicable to the fourth amendment claim because it

involved a substantive right.[3] As for the fourteenth amendment due process claim, the court stated,

> In the present case, Augustine charges the defendant with violating his rights under the due process clause by arresting and detaining him without probable cause and by forcing him to surrender his dog, which he lawfully owned. The allegations in the complaint do not in any way imply that these intentional actions were "random and unauthorized". Nor can we say, simply from the allegations of the complaint, that it would have been impracticable or infeasible for the government to have provided some kind of predeprivation procedural safeguard. Of course, after further proceedings it may become evident that any wrongful acts were "random and unauthorized" and therefore, subject to *Parratt*; if so, the existence of adequate postdeprivation state remedies would justify dismissal.

Augustine, 740 F.2d at 328. Had the *Augustine* court been faced with evidence that the officers' actions were random and unauthorized, it would have dismissed plaintiff's procedural due process claim based on *Parratt*.

In one case, the Fifth Circuit has characterized *Parratt* as a suit for money damages against state officials in their official capacities. *See Brennan v. Stewart*, 834 F.2d 1248, 1254 (5th Cir. 1988) (eleventh amendment immunity case). However, no other case has followed this distinction. This official-individual capacity distinction explains

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[3] Courts uniformly recognize that *Parratt* only applies to random and unauthorized deprivations of procedural due process, not to violations of substantive due process rights or rights guaranteed by the first through eighth amendments.

Parratt in a manner consistent with § 1983 jurisprudence. Otherwise, *Parratt* appears inconsistent with one of the purposes of § 1983 – to provide an aggrieved plaintiff with a federal forum in which to vindicate his constitutional rights.

If *Parratt* were limited to suits against police officers in their official capacity, it would not be inconsistent with other § 1983 doctrines. As recently recognized by the Supreme Court, official capacity suits are actually suits against the state. *See Will v. Michigan Department of State Police,* 109 S. Ct. 2304, 2311 (1989). Thus, if *Parratt* did not foreclose a § 1983 claim in an official capacity suit for an officer's random and unauthorized acts, the state would in effect be subject to respondeat superior or vicarious liability in violation of the doctrine established in *Monell v. Department of Social Services,* 436 U.S. 658 (1978), and reiterated by the Court in *City of St. Louis v. Praprotnik,* 108 S. Ct. 915 (1988). This concern, however, does not apply with equal force when a plaintiff brings an individual capacity suit against an officer who committed a random and unauthorized act in violation of the plaintiff's constitutional rights. However, as the Fifth Circuit applies *Parratt* to foreclose a § 1983 claim when a plaintiff has an adequate state law post-deprivation remedy for his procedural due process violation, I must apply *Parratt* in this case and grant defendant's motion for a judgment notwithstanding the verdict.

Even if the defendant were not entitled to a J n.o.v. based on *Parratt,* he is entitled to a new trial. A new trial is appropriate when the verdict is against the great weight of the evidence, the amount awarded is excessive, or the trial was unfair or marred by prejudicial error.

Worsham v. City of Pasadena, 881 F.2d 1336, 1338 (5th Cir. 1989) (citation omitted).[4] The grant or denial of a new trial is within the discretion of the district court.[5] A grant of a new trial for excessive damages will only be reversed if the trial court abused its discretion. *Worsham v. City of Pasadena*, 881 F.2d 1136, 1138 (5th Cir. 1989) (citation omitted).

Where the issue of liability is strongly disputed and the award of damages is grossly excessive, a new trial on both damages and liability may be appropriate. *Id.* at 1338. In *Worsham v. City of Pasadena*, 881 F.2d 1136 (5th Cir. 1989), the court affirmed a new trial on both liability and damages in a similar situation. Worsham, a construction site inspector, sued the city of Pasadena after Mayor Jim Clark indefinitely suspended him. The only evidence of actual damages introduced at trial was plaintiff's "own highly speculative and unsupported testimony regarding his emotional distress and ruined reputation." The district court granted a new trial on both liability and damages because the evidence did not support the jury's $400,000.00 award of damages.

In this case, defendant is entitled to a new trial on both liability and damages. Because the compensatory damage award was both excessive and against the great weight of the evidence, the defendant is entitled to a new trial. Moreover, the punitive damage award was clearly

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[4] *See also Gates v. Shell Offshore, Inc.*, 881 F.2d 215 (5th Cir. 1989); *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985).

[5] *See also Gates v. Shell Offshore, Inc.*, 881 F.2d 215 (5th Cir. 1989); *Scott v. Monsanto Co.*, 868 F.2d 786, 789 (5th Cir. 1989).

inappropriate because it was so excessive as to shock the conscience. Furthermore, the punitive damage award is not supported by any evidence. Although one may have greater expectations for an officer who achieved the rank of lieutenant, high expectations is not the standard that justifies a punitive damage award. At the very least, the defendant is entitled to a new trial on the punitive damages issue.

Accordingly,

IT IS ORDERED that defendant Lt. Edwin McClendon's motion for a judgment notwithstanding the verdict is GRANTED.

ALTERNATIVELY, IT IS ORDERED that defendant Lt. Edwin McClendon's motion for a new trial is GRANTED.

/s/ Morey L. Sear
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CLAYTON J. CHARBONNET, JR.	*	CIVIL ACTION
VERSUS	*	NO. 88-4718
SHERIFF HARRY LEE ET AL	*	SECTION "G"

JUDGMENT

(Filed Jan. 31, 1990)

The Court now recalls and sets aside the judgment entered on December 11, 1989 and the amended judgment entered on December 27, 1989 in accordance with its decision in post-trial motions.

The court having granted the motion for summary judgment filed by Continental Casualty Insurance Co., and having granted the motions for directed verdict of defendants Jefferson Parish Sheriff's Office and Sheriff Harry Lee, and having granted defendant Lt. McClendon's motion for judgment notwithstanding the verdict;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants Jefferson Parish Sheriff's Office and Sheriff Harry Lee dismissing plaintiff Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr. D.D.S.'s claims with prejudice;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that for the reasons set forth in the record herein, there be judgment in favor of defendant/third party defendant Continental Casualty Insurance Co. dismissing plaintiff Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr. D.D.S., and third party plaintiffs Donald

E. Strain, D.D.S., James D. Kiser, D.D.S., Joseph J. Collura, D.D.S., and the Lakeside Dental Group's claims with prejudice.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that for the reasons set forth in the record herein, there be judgment in favor of defendant Lt. Edwin McClendon and against plaintiffs, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr. D.D.S. dismissing plaintiffs' claims with prejudice;

New Orleans, Louisiana, this 29th day of January, 1990.

/s/ Lorretta G. Whyte
LORRETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ Morey L. Sear
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

Clayton J. CHARBONNET Jr., et al., Plaintiff-Appellants,

v.

Sheriff Harry LEE and Lt. Edwin McClendon, Defendants-Appellees.

DONALD E. STRAIN, D.D.S., a Professional Dental Corp., James D. Kiser, D.D.S., a Professional Dental Corp., Joseph J. Collura, D.D.S., a Professional Dental Corp., and Lakeside Dental Group Defendants-Third-Party Plaintiffs-Appellants,

v.

CONTINENTAL CASUALTY CO., Third-Party Defendant-Appellee.

No. 90-3061
United States Court of Appeals,
Fifth Circuit.

Jan. 28, 1992.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, JOLLY, and DAVIS, Circuit Judges.

WISDOM, Circuit Judge:

This appeal concerns the ongoing question of when a federal court must limit a plaintiff to state law relief for violations of procedural due process. In this case we consider a judgment notwithstanding the verdict in favor of a Louisiana parish police officer sued for his participation in an alleged deprivation of property without due process of law. Because a recent *en banc* opinion by this

Court[1] limits the liability of state actors for violations of the Fourteenth Amendment not authorized or foreseen by constitutional state procedures (if state law offers a post-deprivation remedy), we AFFIRM the judgment n.o.v. in favor of Lieutenant Edwin McClendon.

This case also involves an appeal from a summary judgment in favor of Continental Casualty Insurance Company. We AFFIRM that summary judgment for the reasons stated in the trial court's order of November 21, 1989.

I. BACKGROUND

This case concerns events that took place on August 31, 1988 at the office of Dr. Clayton J. Charbonnet, Jr., in Metairie, Louisiana. On August 30, 1988, Dr. Charbonnet resigned from the Lakeside Dental Group, a partnership he had joined in July 1987. His three partners ("the partners"), who worked at another location, accepted his resignation unanimously. They were concerned, however, over certain medical equipment belonging to them that was in Dr. Charbonnet's office. On August 31, 1988, they consulted an attorney who told them that they could take the furniture from Dr. Charbonnet's office themselves, without benefit of any legal authorization. One of the partners telephoned the Jefferson Parish Sheriff's Office ("JPSO"). He apparently led that office to believe that the partners had court papers giving them the right to take their property from Dr. Charbonnet's office. His message was passed on to Lieutenant Edwin McClendon of the

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[1] *Caine v. Hardy*, 943 F.2d 1406 (5th Cir.1991) (en banc).

JPSO's civil division. McClendon communicated with the partnership; the office manager told him when to meet the partners at Dr. Charbonnet's office.

The JPSO code of conduct contains an article preventing its officers from taking any action in civil matters except to prevent or record a violation of law.[2] Jefferson Parish Sheriff Harry Lee has issued a policy statement and explanation of those procedures. In that statement he directs his officers "to avoid involvement in Civil matters as much as possible. I cannot stress enough that if the circumstances require any intervention in such matter employees must always remain impartial." The policy further states that a deputy responding to a civil call "shall inform all parties involved that his role is that of a 'peace keeper' and he will take no action other than that. The deputy shall at all times remain neutral in his actions."

When Lieutenant McClendon met the partners outside Dr. Charbonnet's office on the night of August 31, he discovered that they lacked the writ of sequestration or

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[2] The article, part of the *Rules for the Administration of the Jefferson Parish Sheriff's Officer – Code of Conduct,* reads as follows:

TITLE III OFFICIAL OBLIGATION

Chapter D. Restricted Activities

Art. 75 Acting in Civil Matters

A member while in performance of his duty shall take no action in a legal matter which is not currently subject to penal jurisdiction, except to prevent or record the violation of a law or ordinance, or in compliance with department procedures.

attachment (or any legal order) necessary to authorize the seizure they were about to undertake. The partners showed him their partnership agreement, nothing else. After reviewing it, McClendon stayed on the scene, and accompanied the partners into Dr. Charbonnet's office. McClendon refused to leave after Dr. Charbonnet asked both him and the partners to get out of his office. Dr. Charbonnet called his attorney, and then again asked McClendon to leave, He did not. Dr. Charbonnet then called the emergency "911" number. When two criminal officers arrived, McClendon met with them alone. They departed, without having taken any action.

Before McClendon and the three partners left Dr. Charbonnet's office that night, they or the workers they employed had removed most of the medical equipment. In the process they cut carpets, damaged the walls and ceiling of the office and, of course, deprived Dr. Charbonnet of the tools of his trade.

Dr. Charbonnet sued Sheriff Lee and Lieutenant McClendon under 42 U.S.C. § 1983, charging them with a violation of his civil rights.[3] To this suit in district court

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[3] Dr. Charbonnet dismissed without prejudice his similar charges against another defendant, the JPSO itself.

We read Dr. Charbonnet's complaint, and his entire lawsuit, to state a claim against Sheriff Lee in his official capacity and against Lt. McClendon in both his official and individual capacities.

As for Sheriff Lee, Dr. Charbonnet alleged that he established a policy that resulted in the the deprivation of his property without due process. He did not allege that Sheriff

(Continued on following page)

he attached pendent state law claims against the partners and Continental Casualty ("CNA"), the partners' liability insurer. The partners also filed a counterclaim against CNA. Before trial the partners settled with Dr. Charbonnet, and the trial court granted a summary judgment in favor of CNA. Dr. Charbonnet rested his case after 2 days of trial; Lee and McClendon both moved for directed verdicts. The court granted Lee's motion because his

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(Continued from previous page)

Lee did anything *personally* to deprive him of his rights, and Sheriff Lee cannot be liable under a theory of *respondeat superior* for the actions of his officers.

As for Lt. McClendon, Dr. Charbonnet's "Second Supplemental and Amended Complaint" states that he "was acting in the course and scope of his employment *or* with the apparent authority of the JPSO" (emphasis added). He also contended that McClendon's activities were "taken under color of state law sufficient to impose liability on him and the JPSO for his *and/or* its actions which form the basis of this litigation" (emphasis added). Although Dr. Charbonnet contended throughout trial that McClendon was obeying an unconstitutional policy, he also showed that in personally enforcing that policy *McClendon* was responsible for depriving the doctor of his rights. When that policy was found to be constitutional, see n. 4 and the accompanying text below, McClendon's potential liability was limited to his individual capacity. Dr. Charbonnet put on evidence of McClendon's personal involvement in the deprivation of his property sufficient for the jury to find that McClendon was personally liable to him for $50,000 of compensatory damages and $175,000 of punitive damages. The irony of this case is that Dr. Charbonnet's success on the facts ensures his loss on the law. The trial court's JNOV declared, as we agree, that, under the *Parratt/Hudson* doctrine, McClendon cannot be legally liable in his individual capacity for those actions.

policy of nointervention in civil matters was constitutional; Lee's procedure could not subject him to liability under § 1983.[4] The court denied McClendon's motion, which was based on the qualified immunity defense he presented at trial. The jury returned a verdict against McClendon; it awarded Clarbonnet compensatory damages of $50,000 and punitive damages of $175,000.

The trial court then granted McClendon's motion for a JNOV. After having viewed the evidence presented at trial, the court found that the doctrine of *Parratt v. Taylor*[5]

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[4] The JPSO policy is a constitutional effort, sanctioned by this Court, to keep its officers from subjecting the parish to § 1983 liability. In *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir.1989), a case cited by the trial court in granting Sheriff Lee's motion for directed verdict, this Court found that a similar policy of neutrality in civil matters kept the police from committing state action under § 1983. The Court wrote that "[b]y simply keeping the peace and declining to advance the cause of either [side], the police department avoided being converted from a governmental agency into a state actor for purposes of establishing a claim under § 1983". *Id.* at 793. The JPSO policy similarly, the sufficiently, prohibited its officers from involving themselves so much in civil matters that they took on the role of state actors. The trial judge correctly granted Sheriff Lee's motion for a directed verdict.

Insofar as that decision found that the policy did not violate the Fourteenth Amendment, it absolved Lee of liability in his *official* capacity. The court acknowledged as much by releasing with Lee the JPSO, even though Dr. Charbonnet had already dismissed the JPSO. The court's decision, as a matter of law, also absolved McClendon of liability in his official capacity for any of his actions that were consistent with that policy.

[5] 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled in part not relevant here* by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

legally precluded a finding of liability against McClendon for his participation in the events of August 31, 1988.[6] On January 31, 1990, the court entered judgment on its JNOV and the dismissal of Sheriff Lee, Dr. Charbonnet appeals that judgment.

II. DISCUSSION

When a state official is involved in a deprivation of property without adequate predeprivation safeguards, he may be liable (in his personal or official capacity) under the Fourteenth Amendment for violating the due process rights of the person deprived of property. When the state's predeprivation safeguards are sufficient, the state actor cannot be liable in his official capacity. Even though he can still be liable in his personal, or individual, capacity as a state actor, the Supreme Court absolves him of such liability when the property "loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur".[7] In such a case, an adequate postdeprivation remedy can provide the due process required by the Fourteenth Amendment. The State cannot do more because "[t]he loss of property, although attributable to the State as action under 'color of law,' is in almost all [such] cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible to provide a meaningful hearing

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[6] The trial court held in the alternative that the excessiveness of the damages would require a new trial. Because we affirm his JNOV in favor of McClendon we need not reach this alternative holding.

[7] *Parratt*, 451 U.S. at 541, 101 S.Ct. at 1916.

before the deprivation."[8] The *Parratt* doctrine, now (because of the opinion that extended *Parratt* to intentional deprivations of property)[9] called the *Parratt/Hudson* doctrine, was based on the balancing test spelled out in *Mathews v. Eldridge*.[10] *Mathews* sets the interest of the individual affected by the action against the interest of the government in maintaining whatever predeprivation procedure it does offer; balanced between them are the risks of the procedure and the probable value, if any, of additional safeguards.[11]

In recent years federal courts have tried to map the boundaries of the *Parratt/Hudson* doctrine. Last year the Supreme Court cast some doubt on its breadth. In *Zinermon v. Burch*[12] the Court held unconstitutional the actions of state officials under a Florida law allowing voluntary admissions into state mental hospitals. The Court found that the Florida law delegated to state officials too much authority in deciding when to deny a patient the additional safeguards of an involuntary commitment. *Zinermon* refused to apply *Parratt/Hudson* because the case lacked three predeprivation conditions necessary to that doctrine. In a case, where those conditions do exist, however, "a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous

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[8] *Id.*

[9] *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

[10] 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[11] *Id.* at 335, 96 S.Ct. at 903.

[12] 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

deprivation, satisfies due process".[13] The conditions are, first, that the deprivation be unpredictable; second, that predeprivation process be impossible, making any additional safeguard useless; and, third, that the conduct of the state actor be unauthorized.[14] In such a case "the State cannot be required constitutionally to do the impossible by providing predeprivation process."[15]

Zinermon treated *Parratt* and *Hudson* as two unusual cases in which the governmental interests prevailed under *Mathews*.[16] The *Zinermon* majority[17] *may* have intended to weaken *Parratt/Hudson*. To the extent the doctrine needed resuscitation, we are bound to notice its resuscitation in this Circuit by this Court's *en banc* decision in *Caine v. Hardy*. Caine reads *Zinermon* to effect only a "wrinkle" on the *Parratt/Hudson* doctrine.[18]

In *Caine*, this Court held that *Parratt/Hudson* prevents the procedural due process claim of a doctor deprived of

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[13] *Id.* at 128, 110 S.Ct. at 984 (citations omitted).

[14] *Id.* at 136-38, 410 S.Ct. at 989-90.

[15] *Id.* at 129, 110 S.Ct. at 985.

[16] *See, e.g., id.* at 128, 110 S.Ct. at 984: "*Parratt* and *Hudson* represent a special case of the general *Mathews v. Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide."

[17] Four Justices dissented; they held that the *Parratt/Hudson* doctrine did apply to unauthorized actions under an unchallenged state law. *Zinermon*, 494 U.S. at 139-151, 110 S.Ct. at 990-997 (O'Connor, J., dissenting). The legal and institutional instability of that majority opinion has not gone unnoticed. *See, e.g., Easter House v. Felder*, 910 F.2d 1387, 1409 (7th Cir. 1990) (Easterbrook, J., concurring).

[18] *Caine*, 943 F.2d at 1416.

his staff privileges at a public hospital because the three predeprivation conditions highlighted by *Zinermon* were each present.[19] *Caine* reads those conditions narrowly enough to make this case, although it involves a different sort of deprivation in an entirely different context, legally indistinguishable. The *Parratt/Hudson* doctrine applies to Dr. Charbonnet's case. For the deprivation of his property he must now look to state law for relief.

A. PROCEDURAL CORRECTNESS OF THE JNOV

Before we reach the merits of the case we address a procedural issue. Dr. Charbonnet contends that the court's JNOV was inappropriate because it was requested and granted on grounds not raised by McClendon's motion for a directed verdict.[20] We disagree.

In moving for a directed verdict McClendon contended that his actions could not subject him to liability under § 1983. At that point McClendon argued that he

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[19] *Id.* 494 U.S. at 150-51, 110 S.Ct. at 996-97. *Caine* at 1413-14.

[20] Fed.R.Civ.P. 50(b) provides in pertinent part that "a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict". This rule is interpreted to prevent a party from raising a new argument after the jury has reached a verdict. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2537, at 598 (West 1971). *Accord Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516 (5th Cir.1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1770, 76 L.Ed.2d 344 (1983); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835 (5th Cir.1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976).

could not be liable not only because his actions were within the JPSO policy, but also because he had not *actively* participated in the seizure of Dr. Charbonnet's property. It does seem that both McClendon and the trial court were then unaware of the application of the *Parratt/Hudson* doctrine to this case. Nevertheless, the argument McClendon made in moving for a JNOV was not so different in nature from the argument he made at the directed verdict stage, nor based on such a different version of the facts, to suggest the sort of ambush that Rule 50(b) is means to prevent.[21] Dr. Charbonnet was not ambushed by a new argument questioning the evidence he presented at trial. If Dr. Charbonnet was trapped by the substance behind McClendon's argument for a JNOV, he was trapped not by any tactical trickery but by the *Parratt/Hudson* doctrine. In arguing for a JNOV McClendon was simply continuing to argue that his actions (now proved by Dr. Charbonnet) could not subject him to liability under § 1983.

Under the *Parratt/Hudson* doctrine, § 1983 *cannot* subject a public official like McClendon to individual capacity liability for violating government policy. In opposition to McClendon's motion for a directed verdict, Dr. Charbonnet's lawyer argued that if neither Sheriff Lee nor his policy were responsible, "then Lt. McClendon was in direct violation of the policy". Dr. Charbonnet thus

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[21] *See, e.g.*, 5A *Moore's Federal Practice* ¶ 50.08, p. 50-77 (emphasizing that the rule is intended to allow a party to defend against an argument of deficient proof before it is too late to cure it). *Accord Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1025 (5th Cir. 1979).

acknowledged at the directed verdict stage the grounds of McClendon's § 1983 defense at the JNOV stage. That McClendon's revival of his defense to § 1983 liability was made under a different line of cases – cases that preclude a federal court from subjecting certain public officials to liability because their actions do not implicate the Fourteenth Amendment – does not violate Rule 50(b).

B. LEGAL CORRECTNESS OF THE JNOV

We should at first note that this appeal does not address whether or not Jefferson Parish should have provided a procedure which would have prevented the *partners* from entering Dr. Charbonnet's office and taking the furnishings from it. The partners failed to seek the legal writ necessary to effect such a seizure. This case does address whether the JPSO, through additional safeguards, could have prevented McClendon's violation of the neutrality it required of him. We think not. In this case the partners' unforeseeable actions made it nearly impossible for the JPSO, to have foreseen, and prevented, McClendon's unauthorized actions, actions that were really *re*actions to the intervention of citizens over whom the JPSO had no control. A series of independent, unpredictable *private* actions stood behind McClendons' similarly unpredictable abuse of his official position; this case satisfies the three conditions for applying the *Parratt/ Hudson* doctrine.

First, although the risks that a private citizen will improperly seize the property of another may be foreseeable to the government, the violation of rules of neutrality by a police officer after a private party has

misrepresented its right to effect such a seizure, is *not* predictable. As in *Caine*, any harm to the plaintiff came not from a lack of foreseeably necessary safeguards but from a violation of controlling state regulations.[22]

Second, it is difficult to imagine what procedure could have prevented this apparently unique misapplication of the neutrality requirements (in a situation already full of elements which the state cannot control) by a police officer. Under *Zinermon* (as interpreted by *Caine*) we find that the JPSO policy does not prevent a high risk of erroneous deprivation, nor would minimal further safeguards have been likely to prevent the deprivation.[23] State law requires compliance with procedural safeguards that both the partners and McClendon ignored.

The third condition is the most important, and should probably come first. Because a finding that the state action was random and unauthorized usually establishes the two other conditions,[24] it has formed the legal

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[22] *See Caine* at 1413-14.

[23] *Zinermon* states that if either of these factors exists (that is, if the state should have foreseen such a deprivation), then *no* postdeprivation remedy can satisfy due process. 494 U.S. at 127-130, 110 S.Ct. at 984-986 (citing *Parratt*, 451 U.S. at 541, 101 S.Ct. at 1916; *Matthews*, 424 U.S. at 335, 96 S.Ct. at 903). *See Caine* at 1413.

[24] *See, e.g., Thibodeaux v. Bordelon*, 740 F.2d 329, 336 (5th Cir. 1984), in which this Court noted that a predeprivation hearing is *always* impracticable and unfeasible for random and unauthorized acts. In another case from the same year we combined the third and first questions by equating "random and unauthorized" with "unpredictable". *Augustine v. Doe*, 740

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battleground of many similar cases. Where the conduct of a state official is random and unauthorized (because the State has instituted a policy forbidding such conduct), then in most cases it will follow that the State could not have predicted, and that further procedural safeguards would have been impotent to prevent, that conduct.

Although it may have been within Lieutenant McClendon's authority to be present at the partners' seizure of the property in Dr. Charbonnet's office, the JPSO policy specifically requires officers in such situations to remain more neutral than McClendon did remain. *Zinermon* cautions us not to find that an action is "unauthorized" simply because it is not sanctioned by state law.[25] Yet the *Zinermon* majority found that the state actions before it were not "unauthorized" only because the state had actually delegated its officials with the broad authority to carry out the deprivation alleged by Mr. Burch.[26] The JPSO policy before us, however, specifically prohibits the kind of official intervention McClendon made at Dr. Charbonnet's office.[27] Dr. Charbonnet's

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F.2d 322, 327 (5th Cir. 1984). We have also said that even "a conspiracy among its employees can indeed by a random act *if the state cannot anticipate or control such conduct in advance*". *Holloway v. Walker*, 790 F.2d 1170, 1172 (5th Cir. 1986) (emphasis added). A State cannot be held liable under § 1983 for the general likelihood that state officials will sometimes violate official policies.

[25] *Zinermon* 494 U.S. at 138, 110 S.Ct. at 990.

[26] *Id.*

[27] This Court has contrasted "random and unauthorized" acts with those that "represented official policy". *See Augustine*, 740 F.2d at 328-29.

suit against McClendon was in fact *based on* the unauthorized and random nature of his actions. The limited terms of that suit, however mistakenly Dr. Charbonnet pursued them, support our application of the *Parratt/Hudson* doctrine here.

Finally we note that Louisiana does offer a post-deprivation remedy to Dr. Charbonnet for McClendon's participation in the destruction of his office, and that Dr. Charbonnet has taken advantage of this alternative. On January 8, 1989, Dr. Charbonnet filed an original petition in the 24th Judicial District Court for the Parish of Jefferson. He later amended that suit to include Sheriff Lee and Lieutenant McClendon as defendants. Dr. Charbonnet has not contested the legal adequacy of this remedy. Nothing we decide here will deprive him of that remedy, under state tort law, for injuries inflicted by Lee or McClendon.

Dr. Charbonnet's letter brief correctly describes the "inescapable corner" into which constitutional law has now painted such a plaintiff. If the policy he challenges is constitutional, there is no official liability; a defendant in his official capacity is merely a representative of that policy. If a state actor is found to have reasonably obeyed an established procedure in his individual capacity, then he wins on the merits. If the official is found to have violated that procedure (and there is an adequate remedy under state law), then he is usually protected in his individual capacity by the *Parratt/Hudson* doctrine. The plaintiff who seeks damages from a state actor under § 1983 for violations of procedural due process can lose the war of liability by winning the battle of proof. We acknowledge that *Caine v. Hardy* does much to swing shut

the door of the federal courts to suits for individual violations of procedural due process. Yet those doors remain open to a plaintiff such as Dr. Charbonnet if the actions of the official were the result of some established municipal procedure, or if the state does not offer an adequate remedy elsewhere. A plaintiff like Dr. Charbonnet has not lost his day in court.

III. CONCLUSION

We find that this case is entirely controlled by *Caine v. Hardy* and its narrow reading of *Zinermon*. If there were no postdeprivation procedure available to Dr. Charbonnet under state law, or if any of the three conditions that *Zinermon* and *Caine* read into the *Parratt/Hudson* doctrine were not present, then the suit against McClendon, based on the evidence Dr. Charbonnet presented at trial, could stand. But there *is* such postdeprivation relief, and (applying *Caine*'s interpretation of these words) McClendon's actions *were* both "unauthorized" and "unforeseeable", and better predeprivation safeguards *were* "impossible". The district court properly decided that it was not the proper forum, and § 1983 was not the proper source of liability, for Dr. Charbonnet's case against McClendon. We AFFIRM the JNOV.

As for the district court's order granting CNA's motion for summary judgment because *all* of the alleged actions of the partners would have been excluded from the coverage of their insurance policy with CNA, we AFFIRM for the reasons carefully set forth in the order.

(2)

Supreme Court, U.S.
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No. 91-1719

In The

Supreme Court of the United States

October Term, 1991

CLAYTON J. CHARBONNET, JR., ET AL.,

Petitioners,

versus

SHERIFF HARRY LEE, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT LT. EDWIN McCLENDON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in granting Judgment Notwithstanding the Verdict to Respondent.

2. Whether Petitioners' claim under 42 U.S.C. § 1983 is controlled by the *Parratt/Hudson* doctrine.

PARTIES TO THE PROCEEDING IN THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

The parties in the U.S. Court of Appeals for the Fifth Circuit were:

Clayton J. Charbonnet, Jr.

Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation

Sheriff Harry Lee

Donald E. Strain, D.D.S., A Professional Dental Corporation

James D. Kiser, D.D.S., A Professional Dental Corporation

Joseph J. Collura, D.D.S., A Professional Dental Corporation

Lakeside Dental Group

Lt. Edwin McClendon

Continental Casualty Company

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SUMMARY OF THE ARGUMENT

This case presents no special or important considerations warranting review by this Court. Petitioners complain that the district court improperly granted Judgment Notwithstanding the Verdict ("JNOV") to Respondent on the basis of a defense which was not previously raised in Respondent's motion for directed verdict. Petitioners wrongly claim that the grant of a JNOV under these circumstances is always barred by Rule 50(b), Fed.R.Civ.P. The Fifth Circuit has counseled a liberal approach to this question and the JNOV was proper under the facts of this case. The district court did not abuse its discretion in granting the JNOV to Respondent.

Petitioners' claim under 42 U.S.C. § 1983 is controlled by the *Parratt/Hudson* doctrine,[1] not *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), as claimed by Petitioners. In *Zinermon*, this Court set out three factors which determine whether *Parratt* applies and each of these factors is present in this case. First, the deprivation of Petitioners' property was unpredictable and was unforeseeable by the Jefferson Parish Sheriff's Office. Second, due to the nature of the deprivation, pre-deprivation process was impossible. Third, the conduct of Respondent was random and unauthorized in the sense the term is used in *Parratt*. As these three conditions are met and Petitioners have an adequate post-deprivation remedy under state law which they are pursuing at this time (*see* Respondent's Appendix ("Resp. App.") 1 - Resp. App. 20), *Parratt* controls their claim and Petitioners cannot recover under 42 U.S.C. 1983.

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[1] The *Parratt/Hudson* doctrine derives from this Court's holdings in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420

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ARGUMENT

I. The district court did not abuse its discretion in granting Judgment Notwithstanding the Verdict to Respondent.

Petitioners contend that the district court improperly granted Respondent JNOV[2] as the JNOV was based upon a defense not previously raised by Respondent. This purely procedural issue raises no special or important considerations as would warrant discretionary review by this Court.

Petitioners argue that the district judge erred in granting a JNOV in favor of Respondent because the defense urged by Respondent in support of the JNOV (the *Parratt/Hudson* doctrine) was not raised in, and was different from the defense raised in, Respondent's motion for directed verdict (the qualified immunity defense).

At the close of Petitioners' case, Respondent moved for a directed verdict on the basis of qualified immunity. Respondent argued that he was not liable to Petitioners under § 1983 because he acted within the parameters of the official policy of the Jefferson Parish Sheriff's Office ("JPSO") and because he did not actively participate in the seizure of Petitioners' property. The trial court denied Respondent's motion for directed verdict and the jury submitted

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(1981), *overruled in part not relevant here* by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

[2] Although Petitioners' argument on this issue is couched in terms of error by the district court, a trial court's ruling on a motion for JNOV is reviewed under the abuse of discretion standard. *Stokes v. Georgia-Pacific Corporation*, 894 F.2d 764 (5th Cir. 1990).

a verdict in favor of Petitioners. The trial court granted Respondent's post-trial motion for JNOV.

The Fifth Circuit upheld the district court's grant of JNOV to Respondent as follows:

> Nevertheless, the argument McClendon made in moving for a JNOV was not so different in nature from the argument he made at the directed verdict stage, nor based on such a different version of the facts, to suggest the sort of ambush that Rule 50(b) is meant to prevent. Dr. Charbonnet was not ambushed by a new argument questioning the evidence he presented at trial. If Dr. Charbonnet was trapped by the substance behind McClendon's argument for a JNOV, he was trapped not by any tactical trickery but by the *Parratt/Hudson* doctrine. In arguing for a JNOV McClendon was simply continuing to argue that his actions (now proved by Dr. Charbonnet) could not subject him to liability under § 1983.
>
> Under the *Parratt/Hudson* doctrine, § 1983 *cannot* subject a public official like McClendon to individual capacity liability for violating government policy. In opposition to McClendon's motion for a directed verdict, Dr. Charbonnet's lawyer argued that if neither Sheriff Lee nor his policy were responsible, 'then Lt. McClendon was in direct violation of the policy'. Dr. Charbonnet thus acknowledged at the directed verdict stage the grounds of McClendon's § 1983 defense at the JNOV stage. That McClendon's revival of his defense to § 1983 liability was made under a different line of cases – cases that preclude a federal court from subjecting certain

> public officials to liability because their actions do not implicate the Fourteenth Amendment – does not violate Rule 50(b). (footnote omitted) (emphasis in original)
>
> Petitioners' Appendix ("Pet. App.") 24

The Fifth Circuit correctly found that the district court's grant of JNOV to Respondent was proper. The grant of a JNOV to a party on the basis of the *Parratt/Hudson* doctrine, following a motion by that party for directed verdict on the basis of qualified immunity, is fully consonant with the policy of Rule 50(b). The particular purposes of Rule 50(b) should be examined in considering a request for JNOV. *Merwine v. Board of Trustees for State Institutions of Higher Learning*, 754 F.2d 631 (5th Cir. 1985), *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62; *Bohrer v. Hanes Corporation*, 715 F.2d 213 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984). The purposes of Rule 50(b) are:

> to enable the trial court to re-examine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury, thereby affording it an opportunity to cure any defects in proof should the motion have merit.
>
> *Merwine v. Board of Trustees for State Institutions of Higher Learning*, 754 F.2d at 634 (5th Cir. 1985), *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62, *quoting Villanueva v. McInnis*, 723 F.2d 414, 417 (5th Cir. 1984)

As acknowledged by the Fifth Circuit in its opinion, Petitioners were "not ambushed by a new argument questioning the evidence [they] presented at trial." Pet. App. 24. In fact, the nature of the evidence necessary to prove a defense of qualified immunity is not so different from the nature of the evidence necessary to prove a *Parratt/Hudson* defense as to constitute an impermissible "trap" for Petitioners.

The Fifth Circuit has recognized that the general rule that a party may not base a motion for JNOV on a ground not included in a prior motion for directed verdict is not to be applied uniformly or mechanically, *Jones v. Benefit Trust Life Insurance Company*, 800 F.2d 1397 (5th Cir. 1986); *Merwine v. Board of Trustees for State Institutions of Higher Learning*, 754 F.2d 631, 634-35, n.2 (5th Cir. 1985), *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62,[3] and in some cases "liberal application of the rule is appropriate." *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021, 1024, and n.4 (5th Cir. 1987).

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[3] In *Jones*, the defendant moved for JNOV on a particular issue of damages and its motion for directed verdict had been based only on issues of liability. The Fifth Circuit held that the JNOV was proper as the defendant had made an objection to the proposed jury charge on the particular damages issue and had thereby preserved its right to raise the issue in a motion for JNOV. In *Merwine*, plaintiff contended on appeal that the district court should not have granted defendant's motion for JNOV on both a Title VII claim and a § 1983 claim because, according to plaintiff, defendant's motion for directed verdict was addressed solely to the Title VII claim. The Fifth Circuit held that the district court properly granted JNOV on both claims:

(Continued on following page)

Thus, under the Fifth Circuit's flexible approach for ruling on a motion for JNOV, the district court did not abuse its discretion under Rule 50(b) in granting Respondent JNOV. Therefore, Petitioners' application for a writ of certiorari should be denied.[4]

(Continued from previous page)

> We are convinced, however, that motions for directed verdict were made both to the Title VII claims tried by the court and to the § 1983 claim tried by the jury. While Lewis' motion did not specifically refer to the § 1983 claim, he did cite, in furtherance of his motion for directed verdict, the lack of evidence to prove *elements* of the § 1983 claim. (emphasis in original)

754 F.2d at 634, n.2

[4] In their Petition for Writ of Certiorari, Petitioners also urge in passing that the JNOV was also improper under the waiver rule of Rule 12(h)(2), Fed.R.Civ.P., and because it was not set forth in the pre-trial order. However, as the waiver argument was not presented to or considered by either court below, this Court should decline to consider it for the first time. *See Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, ___ U.S. ___, 111 S.Ct. 913, 917, ___ L.Ed.2d ___ (1991); *Kamen v. Kemper Financial Services, Inc.*, ___ U.S. ___, 111 S.Ct. 1711, 1716-17, n.4, ___ L.Ed.2d ___ (1991).

The pre-trial order argument is also without merit as Rule 16(e) authorizes modification of the pre-trial order "to prevent manifest injustice." Petitioners' conclusory, one-sentence argument on this point does not even address the issue of the district court's authority to modify a pre-trial order or the question of manifest injustice.

II. Petitioners' claim under § 1983 is controlled by the *Parratt/Hudson* doctrine. Therefore Petitioners cannot recover under § 1983.

According to Petitioners, they are entitled to recover under § 1983 as their claim is governed by *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), rather than *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled in part not relevant here* by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Both the district court and the Fifth Circuit held that Petitioners' claim under § 1983 was barred by the *Parratt/Hudson* doctrine. In reaching its decision that *Parratt*, rather than *Zinermon*, controlled, the Fifth Circuit followed its recent *en banc* decision in *Caine v. Hardy*, 943 F.2d 1406 (5th Cir. 1991) (en banc), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1474, 117 L.Ed.2d 618 (1992).

Contrary to Petitioners' assertion, their case is not controlled by *Zinermon*. In *Zinermon*, the plaintiff was admitted to and stayed five months in a state mental hospital on the basis of his signature on a voluntary admission form. At the time of signing the form, he was heavily medicated, disoriented and suffered from a psychotic disorder. Plaintiff sued under 42 U.S.C. § 1983 for deprivation of liberty without due process of law. This Court held that plaintiff's claim was not controlled by *Parratt/Hudson* for the following three reasons:

> First, [defendants] cannot claim that the deprivation of Burch's liberty was unpredictable . . . It is hardly unforeseeable that a person requesting treatment for mental illness might be

incapable of informed consent . . . Any erroneous deprivation will occur, if at all, at a specific, predictable point in the admission process – when a patient is given admission forms to sign.

. . .

Second, we cannot say that pre-deprivation process was impossible here . . .

In *Parratt*, the very nature of the deprivation made predeprivation process 'impossible.' 451 U.S., at 541, 101 S.Ct., at 1916. It would do no good for the State to have a rule telling its employees not to lose mail by mistake, and it 'borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct.' *Daniels*, 474 U.S., at 342, n. 19 106 S.Ct., at 680, n. 19 (STEVENS, J., concurring in judgments). In *Hudson*, the errant employee himself could anticipate the deprivation since he intended to effect it, but the State still was not in a position to provide predeprivation process, since it could not anticipate or control such random and unauthorized intentional conduct . . .

Third, [defendants] cannot characterize their conduct as 'unauthorized' in the sense the term is used in *Parratt* and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement. In *Parratt* and *Hudson*, the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate (for persons unable to protect their

> own interests) the procedural safeguards required before deprivations occur . . .
>
> We conclude that [defendants] cannot escape § 1983 liability by characterizing their conduct as a 'random, unauthorized' violation of Florida law which the State was not in a position to predict or avert, so that all the process Burch could possibly be due is a post-deprivation damages remedy.
>
> 110 S.Ct. at 989-90

This Court found that the state should have foreseen and predicted the possibility of abuse of discretion by its employees in admitting patients to a mental hospital and therefore should have established rules and procedures designed to limit and direct that discretion so as to prevent abuse. Instead the state granted unlimited discretion during the admission process and the foreseeable violation of rights occurred. Therefore, inadequate predeprivation remedies were in place and *Parratt* did not bar Burch's claim. This Court pointed out that, if appropriate limitations on discretion had been in place to limit the state employees' authority and to guide their decisions so as to prevent foreseeable deprivations and Burch's rights had nonetheless been violated, *Parratt* would have barred Burch's claim. In such a situation the state would have had in place procedures to prevent abuses of discretion and violation of rights and could do no more than offer adequate post-deprivation remedies for a violation of those procedures and rights. The state could not be expected to provide anything else to prevent random and unauthorized acts. As this Court observed, rules prohibiting negligent or intentional misconduct are absurd.

These principles were refined and reaffirmed by the Fifth Circuit *en banc* in *Caine v. Hardy, supra.* In *Caine v. Hardy, supra,* plaintiff raised a procedural due process claim based on the allegedly improper suspension of his hospital staff privileges. The Fifth Circuit *en banc* analyzed *Zinermon* as follows:

> *Zinermon* holds that if 'random and unauthorized' conduct of state actors is alleged, the mere existence of even an 'adequate' post-deprivation remedy does not satisfy procedural due process where (a) the particular pre-deprivation administrative procedure presents a high risk of erroneous deprivation, and (b) there is a substantial likelihood that further minimal procedural safeguards could prevent the erroneous deprivation. *Zinermon* thus requires a hard look at a *Parratt/Hudson* defense to determine whether the state officials' conduct, under all the circumstances, could have been adequately foreseen and addressed by procedural safeguards. *Zinermon* did not explicitly or implicitly disavow the *Parratt/Hudson* doctrine; instead, it requires case-by-case analysis of the deprivation at issue. *See* 100 S.Ct. at 987-90.
>
> *Zinermon* stated three preconditions for application of the *Parratt/Hudson* doctrine: the deprivation must truly have been unpredictable or unforeseeable; the predeprivation procedures must have been impotent to counter the state actors' particular conduct; and the conduct must have been 'unauthorized' in the sense that it was not within the officials' express or implied

> authority. *Id.* at 987-88. Each of these criteria is established in the case before us.
>
> 943 F.2d at 1413

Application to Petitioners' claim of the "case-by-case analysis" counseled by this Court in *Zinermon* and articulated by the Fifth Circuit in *Caine* mandates the conclusion that the district court properly applied *Parratt* to Petitioners' claim. As shown by the following analysis, each of the three preconditions for application of *Parratt* is present in this case.

1. The deprivation was truly unpredictable or unforeseeable.

Petitioners allege that Respondent "cannot claim that the deprivation of Dr. Charbonnet's property was unpredictable. The JPSO was clearly aware of the fact that its officers were regularly involved in civil matters outside of the civil seizure process. The JPSO could predict when deprivations would occur as a result of an officer's actions and promulgated a policy with respect thereto. Lt. McClendon himself could specifically predict when deprivation would occur in this instance." Petition for Writ of Certiorari ("Petition") at 23.

Petitioners' claim that the JPSO "could predict when deprivations would occur as a result of an officer's actions" is meritless. The predictability in *Zinermon* arose from the fact that a deprivation, if any, would occur at a precise point in time, i.e., at the moment an individual seeking admission to a state mental hospital (who very likely lacked capacity to give consent) was given consent forms to sign. In a case like *Parratt* (or this case), on the

other hand, there is absolutely no way for the state to know when an employee will destroy a package intended for another person, or when an employee will disregard an official policy of non-intervention and become involved in a situation from which he was specifically directed to refrain. Petitioners appear to confuse the state's knowledge that violations of the type in *Parratt* or this case *will occur* with the state's knowledge (or lack thereof) of precisely *when* such violations will occur.

Further, Petitioners' focus on the ability of *Lt. McClendon*, an individual state actor, to foresee or predict the deprivation illustrates a basic misunderstanding of the issue. "[A]n individual state employee's ability to foresee the deprivation is 'of no consequence,' because the proper inquiry under *Parratt* is 'whether the *state* is in a position to provide for predeprivation process'." *Zinermon*, 110 S.Ct. at 985-86, *quoting Parratt*, 104 S.Ct. at 3204 (emphasis in *Zinermon*). *See Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) (*en banc*), *cert. denied*, ___ U.S. ___, 111 S.Ct. 783 (1991).

2. Predeprivation procedures could not have countered the particular conduct of Lt. McClendon.

The controlling inquiry in determining whether a procedural due process claim is barred by *Parratt* is "whether the state is in a position to provide for predeprivation process." *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393 (1984). It is difficult to imagine what sort of predeprivation process the state could have provided to prevent the particular conduct of Lt. McClendon. Petitioners claim that "predeprivation

proceedings were available here. Louisiana had in effect a procedure for obtaining proper court authority to seize the property of another." Petition at 23. Petitioners' claim misses the mark. The so-called "procedure for obtaining proper court authority to seize the property of another" was available to the creditors of Dr. Charbonnet (his three soon-to-be former partners), not to Respondent.

The only available process under Louisiana law was writs of seizure, fi fa or sequestration – none of which was the responsibility of Lt. McClendon and indeed he had no standing to seek them. These three private individuals (Dr. Charbonnet's partners) could have complied with state law and obtained the required writs through judicial proceedings before they appeared at Dr. Charbonnet's door demanding the property. The question is, after they failed to do so, what policy and procedures did Sheriff Lee have in place to restrict the discretion and authority of his officers, including Respondent, in such a situation. As the sheriff had anticipated such a situation and by policy and procedures had properly restrained the discretion and authority of his deputies, then he did all he could do. The random, unauthorized act followed. Therefore *Parratt* applies and Petitioners have no claim under § 1983.

3. Lt. McClendon's conduct was "unauthorized." It was not within his express or implied authority.

The trial judge specifically found that the policy of the JPSO of non-intervention or neutrality in civil matters

was constitutional.[4] The jury found that Lt. McClendon violated this policy when he did not remain neutral to preserve the peace.

But Petitioners argue that "Lt. McClendon cannot now properly claim that his conduct was 'unauthorized' in the same sense as that term was employed in *Parratt/Hudson*." Petition at 24. In stark contrast to the broad power given to the staff of the mental hospital in *Zinermon*, Lt. McClendon was given *no power* to exercise any judgment as to whether to intervene or to remain neutral. The sheriff's policy forbade intervention by Lt. McClendon. He violated that policy by failing to remain neutral. *See also Soldal v. County of Cook*, 923 F.2d 1241 (7th Cir. 1991), *vacated and rehearing en banc granted*, 931 F.2d 445, *panel opinion reinstated in part*, 942 F.2d 1073, *cert. granted*, ___ U.S. ___, 112 S.Ct. 1290, 117 L.Ed.2d 514 (March 9, 1992), where the panel opinion held, on substantially identical facts, that the acts of the defendant deputy sheriffs were "random and unauthorized acts of subordinate public officers." 923 F.2d at 1248.[5]

Adequate post-deprivation remedies

There can be no serious question as to the presence of an adequate post-deprivation remedy for Petitioners.

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[4] This finding was not appealed by Petitioners.

[5] The Petition for Writ of Certiorari in the *Soldal* case did not seek review on the procedural due process issue. Therefore the finding that the acts of the deputy sheriffs were random and unauthorized is final.

Indeed, they are in the process of availing themselves of that remedy – a state tort action against Sheriff Lee and Lt. McClendon in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, which is pending at this time. *See* Petition for Damages and First Supplemental Amended Petition for Damages in *Clayton J. Charbonnet, Jr. et al. v. Donald E. Strain & Associates (A Professional Dental Corporation) et al.*, No. 374-563, 24th Judicial District Court of the Parish of Jefferson, State of Louisiana, attached as Resp. App. 1 - Resp. App. 20.[6] The Fifth Circuit recognized in *Caine v. Hardy* that such an action constitutes an adequate post-deprivation remedy under the *Parratt* analysis. 943 F.2d at 1414, n. 6.

CONCLUSION

The Fifth Circuit in *Caine v. Hardy* observed that "as *Zinermon* counseled case-by-case application of its principles, so it seems at this stage to represent a sui generis situation." 943 F.2d at 1415. The facts of this case simply do not justify a departure from this observation. This Court denied the Petition for Writ of Certiorari in *Caine v. Hardy*. The Fifth Circuit correctly found that Petitioners'

[6] These two pleadings appear in the district court's record as Exhibits A and B to Respondent's Motion for Judgment Notwithstanding the Verdict and Alternatively for a New Trial, filed December 14, 1989, rec.doc. 82.

claim was controlled by *Caine*. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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24TH JUDICIAL DISTRICT COURT FOR
THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 374-563 DOCKET NO.

DIVISION

CLAYTON J. CHARBONNET, JR.
and CLAYTON J. CHARBONNET,
JR., D.D.S., A PROFESSIONAL CORPORATION

versus

DONALD E. STRAIN & ASSOCIATES (A PROFESSIONAL DENTAL CORPORATION), JAMES D. KISER, D.D.S., A PROFESSIONAL DENTAL CORPORATION, JOSEPH J. COLLURA, D.D.S., JR. (A PROFESSIONAL DENTAL CORPORATION), DONALD E. STRAIN, JAMES D. KISER, JOSEPH J. COLLURA, JR. AND LAKESIDE DENTAL GROUP

FILED: _____ _____
DEPUTY CLERK

PETITION FOR DAMAGES
(Filed Jan. 9, 1989)

NOW INTO COURT, through undersigned counsel, come plaintiffs, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation, who, with respect represents:

1.

Clayton J. Charbonnet, Jr. ("Charbonnet") is an individual residing in Jefferson Parish, Louisiana and Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation ("Charbonnet Corporation") is incorporated in the State

of Louisiana with its principal place of business in Jefferson Parish, Louisiana (collectively "Charbonnet").

2.

(A) Donald E. Strain ("Strain") is an individual residing in Jefferson Parish, Louisiana and Donald E. Strain & Associates (A Professional Dental Corporation) ("Strain Corporation") is incorporated in the State of Louisiana with its principal place of business in Jefferson Parish, Louisiana (collectively "Strain").

(B) James D. Kiser ("Kiser") is an individual residing in Jefferson Parish, Louisiana and James D. Kiser, D.D.S., A Professional Dental Corporation ("Kiser Corporation") is of business in Jefferson Parish, Louisiana (collectively "Kiser").

(C) Joseph J. Collura, Jr. ("Collura") is an individual residing in Jefferson Parish, Louisiana and Joseph J. Collura, Jr., D.D.S. (A Professional Dental Corporation) ("Collura Corporation") is incorporated in the State of Louisiana with its principal place of business in Jefferson Parish, Louisiana (collectively "Collura").

(D) Lakeside Dental Group ("LDG") is a partnership comprised in whole or in part of the Strain Corporation, Kiser Corporation and Collura Corporation. LDG maintains its principal place of business in the Parish of Jefferson, State of Louisiana. (These defendants are collectively called "the dentists".)

3.

Plaintiffs request trial by jury on all matt4ers contained in the Complaint.

FACTS

4.

Effective July 1, 1987, Charbonnet Corporation and defendants Strain Corporation, Kiser Corporation and Collura Corporation entered into a partnership for the practice of dentistry under the name "Lakeside Dental Group". On information and belief, prior to that time, LDG was a partnership comprised of Collura Corporation, Kiser Corporation and Strain Corporation.

5.

Charbonnet Corporation was induced to enter the partnership by numerous promises and representations made by defendants including promises and agreements as to compensation and sharing of profits generated by LDG.

6.

Over the course of a period greater than one year, the dentists breached obligations and provisions of the partnership agreement, made decisions contrary to Charbonnet's best interests and failed to provide Charbonnet with items that LDG was obligated to provide under the terms of the partnership agreement.

7.

On or about August 30, 1988, Charbonnet announced that Charbonnet Corporation intended to withdraw from LDG.

8.

Charbonnet expressed his expectation that Charbonnet Corporation's partnership interest would be amicably distributed in due course and under proper administration and at no time during the meeting held on or about August 30, 1988 did the dentists indicate that they would not engage in amicable efforts to distribute partnership proceeds, assets and property to Charbonnet.

9.

On August 31, 1988, Collura, acting as an agent for and with the blessing of the dentists, contacted the JPSO and obtained the services of a JPSO Deputy to accompany Collura, Strain and Kiser to Charbonnet's office at 5036 Yale Street, Suite 301, Metairie, Louisiana and to assist them, under color of law, in the removal of property from that location.

10.

The dentists, along with the JPSO Deputy (who was acting in the course and scope of his employment or with the apparent authority of the JPSO), all acting under color of state law, arrived and entered 5036 Yale Street, Suite 301, Metairie, Louisiana at approximately 8:00 p.m. on August 31 and, in spite of Charbonnet's protestations and

without a writ of sequestration, attachment, order or other documents entitling them to take possession of any property, and without an inventory of any kind, seized furniture, dental equipment, lab equipment, patient charts, and personal items in Charbonnet's office.

11.

The items removed from Charbonnet's office were taken into the defendants' custody at a location remote from Charbonnet's office.

12.

During the course of their activities, the defendants damaged the walls, ceiling, plumbing, electrical wiring and carpet in Charbonnet's office.

13.

Despite demand, the dentists have failed to return any property to Charbonnet.

14.

Beginning on our about August 31, 1988, the dentists engaged in a pattern and practice of calling Charbonnet's patients and, unilaterally, without Charbonnet's consent, cancelling appointments made by those patients with Charbonnet and representing, among other things, that Charbonnet was unable to treat patients.

15.

Further, from and after August 31, 1988, the dentists carried on a pattern and practice of disseminating false and misleading information to Charbonnet's patients including advising patients that, among other things, Charbonnet was no longer practicing orthodontia, the patient should not be treated by Charbonnet and/or the payment for services rendered by Charbonnet in the future would have to be made to LDG.

16.

Since August 31, 1988, the dentists have taken control of and have made improper distribution of LDG finances including failing to distribute any earnings to Charbonnet.

17.

Further, without properly accounting for or inventorying the property seized from 5036 Yale Street, Suite 301, Metairie, Louisiana, the dentists have begun to utilize that property in the performance of their practice despite the fact that the vast majority of such seized property was and is owned by Charbonnet.

18.

Charbonnet does not have a written inventory of all items seized from his office and, accordingly, Charbonnet has, by memory, made a list of all items belonging to him

which were seized by the dentists and the Jefferson Parish Sheriff's Office Deputy acting under the color of state law.

19.

Subsequent to the seizure of the property from 5036 Yale Street, Suite 301, Metairie, Louisiana, the dentists submitted to Charbonnet an inventory of the property seized by them. The referenced inventory contains some property which Charbonnet, through memory, does not recall and omits certain other items which were in fact taken from Charbonnet's office at 5036 Yale Street, Suite 301, Metairie, Louisiana on August 31, 1988.

COUNT I

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Charbonnet incorporates in this count each of the previous allegations and representations made in this Complaint.

20.

At all times pertinent hereto, the dentists and JPSO knew that their actions would deprive Charbonnet of his ability to engage in the practice of orthodontics for which he was qualified.

21.

Despite the dentists' knowledge that they had no immediate use of the property which they seized on August 31, 1988 and despite further knowledge that such property was essential to Charbonnet's ability to carry on his professional practice, defendants nonetheless engaged in the seizure of the property and recklessly, wantonly, negligently and intentionally inflicted on Charbonnet severe emotional distress, mental anguish in the amount of $500,000, and caused loss of professional reputation and practice in the amount of $750,000.

COUNT II
CONVERSION AND DESTRUCTION OF PROPERTY

Plaintiff incorporates in this count each of the previous allegations and representations made in this complaint.

22.

At all times pertinent hereto, the dentists, by taking possession of and beginning to use petitioner's property, have improperly converted that property to their own and have damaged the premises at 5036 Yale Street, Suite 301, Metairie, Louisiana thereby depriving Charbonnet of property which is rightly Charbonnet's for which defendants are indebted unto Charbonnet in the full amount of the value thereof which amount is currently estimated to be $115,000.

23.

As a further result of the seizure and destruction of Charbonnet's property, he has had to spend significant time and money replacing and/or repairing items of which he was wrongfully deprived. It is currently estimated that petitioner will spend approximately $115,000 to replace and/or repair the property which was wrongfully converted or damaged.

24.

As a result, Charbonnet will have to borrow funds which he would not have otherwise borrowed and will suffer the loss of use of that money either through the loss of investment interest or through the payment of interest charged by a lending institution. Defendants are liable for reimbursement of all such loss of use of Charbonnet's money and/or the payment of such interest.

25.

Further, Charbonnet will have to spend substantial personal time and energy in repairing, recovering and repurchasing property. Charbonnet is entitled to compensation for the fair value of that time.

COUNT III

BREACH OF FIDUCIARY DUTY AND ACCOUNTING

Plaintiff incorporates in this count each of the previous allegations and representations made in this Complaint.

26.

At all times pertinent hereto, the dentists owed Charbonnet a fiduciary duty as partners to treat Charbonnet fairly, make proper distributions and accountings of partnership property and earnings and to treat Charbonnet in a fair and equal manner until such time as Charbonnet is paid the fair value of Charbonnet Corporation's partnership interest.

27.

The dentists and LDG are required by Louisiana law to pay to Charbonnet Corporation the fair market value of Charbonnet Corporation's interest in LDG as of the date of the termination of such interest.

28.

The dentists breached each of these obligations and have failed to pay Charbonnet Corporation the value of its interest in LDG and have likewise failed to return to Charbonnet all property which actually belongs to it and not to the partnership.

29.

As a result of the foregoing, Charbonnet is entitled to an accounting establishing the full value of its interest in the partnership and immediate distribution of the value thereof along with legal interest from the day the partnership terminated as well as to an accounting of the value of all property seized from him and either the immediate

return of or alternatively payment for the value of the property so seized.

COUNT IV
UNFAIR TRADE PRACTICES

Charbonnet incorporates in this count each of the previous allegations and representations made in this Complaint.

30.

La. R.S. 51:1405 sets forth a cause of action for unfair methods of competition. That statute specifically outlaws any practice which may be deemed "an unfair method of competition".

31.

The dentists engaged in an unfair and prohibited method of competition by, among other things, seizing Charbonnet's professional property making it difficult, if not impossible, for Charbonnet to service patients by seizing appliances and devices fabricated by Charbonnet and needed by patients as part of their treatment, by unilaterally cancelling appointments made with Charbonnet, by disseminating false information concerning the nature of Charbonnet's practice.

32.

As a result of the foregoing, Charbonnet is entitled, pursuant to La. R.S. 51:1409, to full reimbursement for

ascertainable loss of money and movable property along with treble damages, reasonable attorney's fees and costs.

33.

Charbonnet calculates its ascertainable loss of money through loss of business, including loss of revenues from all appointments cancelled by the dentists, and loss of future business in the amount of $750,000 and movable property valued at approximately $100,000 as previously identified herein.

COUNT V
DEFAMATION

Charbonnet incorporates in this count each of the previous allegations and representations made in this Complaint.

34.

In disseminating to members of the public that Charbonnet was out of business, unable to treat patients, did not have an interest in treating patients who would owe money to LDG and making other misrepresentations concerning Charbonnet's professional practice and competency, the dentists have defamed Charbonnet. The defamation is both *per se* and by innuendo.

35.

As a result of the foregoing, Charbonnet is entitled to damages including emotional distress, mental anguish

and damage to Charbonnet's reputation in the amount of $500,000 and loss of business in the amount of $750,000.

WHEREFORE, Charbonnet prays that this Complaint be filed and that defendants be duly served and cited with same and that after all due proceedings are had herein, that there be judgment in favor of plaintiffs, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation and against defendants Sheriff Harry Lee, The Jefferson Parish Sheriff's Office, Donald E. Strain & Associates (A Professional Dental Corporation), James D. Kiser, D.D.S, A Professional Dental Corporation, Joseph J. Collura, Jr., D.D.S. (A Professional Dental Corporation), Lakeside Dental Group, Donald E. Strain, James D. Kiser and Joseph J. Collura, Jr., jointly, severally and in solido for the amounts prayed for in the body of the Complaint, and for all costs and attorney's fees and all equitable relief.

LOWE, STEIN HOFFMAN & ALLWEISS

By: /s/ Illegible
Michael R. Allweiss, TA (2425)
Mark S. Stein (12428)
650 Poydras Street
Suite 2450
New Orleans, Louisiana 70130
Telephone: (504) 581-2450
Attorneys for Plaintiffs,
Clayton J. Charbonnet, Jr.
and Clayton J. Charbonnet, Jr.,
D.D.S., A Professional Corporation

PLEASE SERVE:

Hold Service

24TH JUDICIAL DISTRICT COURT FOR
THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 374-563 DIVISION "B"

CLAYTON J. CHARBONNET and
CLAYTON J. CHARBONNET, JR., D.D.S.
A PROFESSIONAL DENTAL CORPORATION

versus

DONALD E. STRAIN, D.D.S., A PROFESSIONAL DENTAL CORPORATION, JAMES D. KISER, D.D.S., A PROFESSIONAL DENTAL CORPORATION, JOSEPH J. COLLURA, D.D.S., A PROFESSIONAL DENTAL CORPORATION and LAKESIDE DENTAL GROUP

FIRST SUPPLEMENTAL AMENDED
PETITION FOR DAMAGES

(Filed March 30, 1989)

NOW INTO COURT, through undersigned counsel, come plaintiffs, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr., D.D.S., a Professional Dental Corporation, who, by filing this First Supplemental and Amending Petition supplements and amends the original petition previously filed herein in the following particulars:

1.

Plaintiffs reincorporate and reallege as if copied here in extenso, each and every allegation made in the original petition except as amended hereby.

2.

By adding as additional defendants listed in paragraph 2 the following:

1) Harry Lee, Sheriff of Jefferson Parish, a person of the full age of majority and a resident of this parish.

2) Lt. Edward McClendon, a person of the full age of majority and a resident of this parish.

3) Continental Casualty Company, a foreign insurer authorized to do and doing business in Louisiana, which at all times pertinent hereto provided liability insurance to defendants, Strain Kiser and Collura, for the acts and damages alleged herein.

3.

By amending paragraph 2(a) to read as follows:

At all times material hereto, Harry Lee was responsible for the acts of Edward McClendon and Edward McClendon was acting in the course and scope of his employment with the JPSO.

4.

By adding an additional Count IV to read as follows:

COUNT IV

Negligence, abuse of power, abuse of right, misrepresentation, tortious inference with contract and trespass.

36.

That at all times pertinent hereto, the abuse of Dr. Charbonnet's rights, the entry onto his premises, the seizure of his property, the disruption of his business and all harm which flows therefrom could not have occurred but for and was in fact and law caused by abuse of office and authority, numerous breaches of duty of Harry Lee and Edward McClendon in the following nonexclusive particulars:

1) By aiding, abetting and assisting Lakeside Dental Group, Strain, Kiser and Collura in the seizure of Dr. Charbonnet's property.

2) By not obtaining or requiring appropriate court orders before entering the premises at 5036 Yale Street.

3) By not having proper procedures to protect the rights of individuals in civil disputes.

4) By not following appropriate procedures.

5) By failing to properly conduct the business of the Jefferson Parish Sheriff's Office.

6) By improperly lending an air of authority to and giving assistance and specific support to wrongful seizures knowing that there were court orders and legal processes, including, without limitation, writs of sequestration and attachment, which could have issued in the event of a dispute as to ownership and/or possession of property.

7) By intimidating Dr. Clayton Charbonnet in such a fashion as to prohibit and interfere with his protecting his own rights and property.

8) By refusing to leave 5036 Yale Street when so requested.

9) Such other abuses and wrongs as will be proved at trial.

37.

As a result of the foregoing, Harry Lee and Lt. Edward McClendon are indebted jointly, severally and in solido unto the plaintiffs for all of the damages suffered by Clayton Charbonnet as alleged herein.

38.

Each of the defendants knew or should have known that the seizure of property from 5036 Yale Street was wrongful and would cause Dr. Charbonnet substantial harm. The dentists' actions were negligent and tortious in several respects including but not limited to:

1) Failure to obtain a court order giving rise to a right to seize any property.

2) Failing to properly identify property which they owned.

3) Failing to follow a procedure authorized by law to take custody of any property.

4) Failing to supply the JPSO office with complete and accurate information on the status of the property at 5036 Yale Street.

5) Seizure of property which they had no right to seize.

Harry Lee and Edward McClendon were negligent and tortious in numerous respects including but not limited to:

1) Failing to have in effect proper guidelines for the involvement of the JPSO in matters such as this.

2) Failing to follow or enforce reasonable guidelines for the involvement of the JPSO in matters such as this.

3) Failing to recognize the impropriety of the seizure.

4) Lending assistance to and became a part in a wrongful seizure.

5) Refusing to leave 5036 Yale Street when instructed to do so.

WHEREFORE, Clay Charbonnet and Clay Charbonnet, P.C. prays that this First Supplemental and Amending Petition for Damages be filed and that defendants be duly served and cited with same and that after all due proceedings are had herein, that there be judgment in favor of plaintiffs, Clayton J. Charbonnet, Jr. and Clayton J. Charbonnet, Jr., D.D.S., A Professional Corporation and against defendants Continental Casualty Company, Sheriff Harry Lee, Edward McClendon, Donald E. Strain & Associates (A Professional Dental Corporation), James D. Kiser, D.D.S., (A Professional Dental Corporation), Joseph J. Collura, Jr., D.D.S. (A Professional Dental Corporation), Lakeside Dental Group, Donald E. Strain, James D. Kiser and Joseph J. Collura, Jr., Sheriff Harry Lee, Edward McClendon and Continental Casualty Company, jointly, severally and in solido for the amounts prayed for in the

body of the Petition for Damages, and for all costs and attorney's fees and all equitable relief.

LOWE, STEIN, HOFFMAN &
ALLWEISS

By /s/ Michael R. Allweiss
MICHAEL R. ALLWEISS (2425)
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Telephone (504) 581-2450
Attorney for Plaintiff

PLEASE SERVE:

Continental Casualty Company (Original and Supplemental Petition)
Through the Secretary of State
Baton Rouge, Louisiana

Edward McClendon (Original and Supplemental Petition)
Jefferson Parish Sheriff's Office
Through Dan Martiny, Esq.
1100 Causeway Blvd.
Metairie, Louisiana

Harry Lee (Original and Supplemental Petition)
Through his attorney of record:
Dan Martiny, Esq.
1100 Causeway Blvd.
Metairie, Louisiana

Donald E. Strain, D.D.S. (Supplemental Petition)
A Professional Dental Corporation
Through its attorney of record:
J. Nelson Mayer, Esq.
844 Baronne Street
New Orleans, La.

James D. Kiser, D.D.S.
A Professional Dental Corporation
Through its attorney of record:
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New Orleans, La.

Joseph J. Collura, Jr., D.D.S.
A Professional Dental Corporation
Through its attorney of record:
J. Nelson Mayer, Esq.
844 Baronne Street
New Orleans, La.

Lakeside Dental Group
Through its attorney of record:
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844 Baronne Street
New Orleans, La.